

EB 04-381

Before The  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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Federal Communications Commission  
Office of the Secretary

FLORIDA CABLE  
TELECOMMUNICATIONS  
ASSOCIATION, INC., COX  
COMMUNICATIONS GULF COAST,  
L.L.C., et. al.

*Complainants,*

v.

GULF POWER COMPANY,

*Respondent,*

P.A. No. \_\_\_\_\_

TO: Cable Services Bureau

**COMPLAINT**

This is a pole attachment complaint brought pursuant to Rule 1.1404 by the Florida Cable Telecommunications Association ("Association") on behalf of its respective cable operator members,<sup>1</sup> (collectively "Cable Operator Complainants"), against Gulf Power Company's ("Gulf Power") for its unreasonable, unilateral requirement that Cable Operator Complainants' execute new pole attachment agreements and its imposition of an unlawful pole attachment rate increase.

<sup>1</sup> Attached as Exhibit 1 are Cable Operator Complainants' Rule 1.1404(a) certifications. Attached as Exhibit 2 is a table setting forth the identities of Cable Operator Complainants, the communities they serve, and the number of Gulf Power poles to which their facilities are attached.

## BACKGROUND

For at least the past two decades, Florida cable operators have attached their facilities to Gulf Power poles based upon voluntary pole contracts to which the parties mutually agreed. Over the last several weeks, Gulf Power began the process of announcing to cable operators its intention to demand that cable operators within its service area execute new pole agreements. Gulf Power also began informing these cable operators of its intention to demand pole-rates under the new pole agreements that will exceed the current rate by **more than 514 percent (and in one case as high as 550 percent)** to a new rate of \$38.06 per pole.

Cable Operator Complainants immediately contacted Gulf Power, expressing their desire to maintain ongoing relations with the utility and to engage in good faith negotiations regarding the draft pole contract. Cable Operator Complainants also inquired about both the reasons for the sudden change in prior course of dealing by Gulf Power and the terms, conditions, and rates that Gulf Power contemplated for any new pole agreement. In response to Cable Operator Complainants' good-faith inquiry into Gulf Power's new rates (including a request for supporting data that Gulf Power largely rebuffed), Gulf Power refused to negotiate or moderate its position. Finally, on June 26, 2000 Gulf Power declared that Cable Operator Complainants must execute its new pole attachment agreement, and the new pole rate would become effective on July 1, 2000. Gulf Power sent invoices to at least some Cable Operator Complainants on July 5, 2000 which Complainants received on July 6, 2000, serving effective notice of its intention to charge the unlawful \$38.06 rate.

## **I. PARTIES**

1. Complainant Association is a not-for-profit corporation and represents the interests of Cable Operator Complainants based in the state of Florida. The Association has an address of 310 North Monroe Street, Tallahassee, FL 32301.

2. Exhibit 1 sets forth certifications of cable operators who have authorized the Association to represent them in this case.

3. Respondent Gulf Power Company, a Maine Corporation, is an electric utility providing various forms of electrical services to customers in the state of Florida. Gulf Power is a subsidiary of The Southern Company. Gulf Power's corporate office is located at One Energy Place, Pensacola, Florida 32520.

## **II. JURISDICTION**

4. This Commission has jurisdiction over this action under the provisions of the Communications Act of 1934, as amended, including, but not limited to, Section 224 thereof. 47 U.S.C. § 224.

5. Gulf Power owns and controls utility poles in the state of Florida. Such poles are used for the purposes of wire communications.

6. Southern Telecom Holding Company, Inc., Southern Telecom 1, Inc., and Southern Telecom 2, Inc., subsidiaries of the Southern Company and affiliates of Gulf Power, filed for and were granted "exempt telecommunications company" ("ETC") status by the Federal Communications Commission ("FCC"). *In the Matter of Applications of Southern Telecom Holding Company, Inc., Southern Telecom 1, Inc., and Southern Telecom 2, Inc. for Determination of Exempt Telecommunications Company Status*, File Nos. ETC-96-8, ETC-96-9, and ETC-96-10 (rel. June 14, 1996).

7. Cable Operator Complainants possess attachments on Gulf Power poles throughout the northwest region of Florida, as set forth in Exhibit 2 attached to this Complaint.<sup>2</sup>

8. Upon information and belief, Complainants allege that Gulf Power is not owned by any railroad, any person that is cooperatively organized or any person owned by the Federal Government or any State.

9. Upon information and belief, Complainants allege that neither the State of Florida, nor any of its political subdivisions, agencies, or instrumentalities, regulates the rates, terms or conditions of pole attachments in the manner required by Section 224 of the Communications Act.

10. Attached to this Complaint is a Certificate of Service certifying that service was effected on Gulf Power and each federal, state and local agency which regulates any aspect of service provided by Gulf Power.

### **III. DISCUSSION**

11. Cable Operator Complainants and Gulf Power have voluntarily entered into pole attachment contracts for approximately two decades. Ex. 7, ¶ 15; Ex. 8, ¶ 5. All cable operators in Florida that have attachments on Gulf Power poles have gained access to those poles, and currently have their facilities located on such poles, through such voluntary contractual agreements with Gulf Power. Ex. 8, ¶ 5.

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<sup>2</sup> Copies of the current pole attachment agreements between Gulf Power and Cable Operator Complainants are attached as Exhibits 3, 4 and 5. A copy of Cable Operator Complainants' most recent pole attachment rental invoices for Gulf Power poles demonstrating the number of Cable Operator Complainant attachments to Gulf Power poles is attached as Exhibit 6.

12. Cable Operator Complainants' currently applicable pole contracts give Cable Operator Complainants a license to attach their cables and related facilities to Gulf Power's poles but not a share of the poles' ownership. Ex. 3; Ex. 4; Ex. 5.

13. Cable Operator Complainants' contracts with Gulf Power usually provide for a term of several years. In most cases, the contracts also provide that they remain in effect after the specified term expires unless one party gives written notice of its intent to terminate the contract to the other party. Ex. 3, ¶ 23(E); Ex. 4, ¶ 23(E); Ex. 5, ¶ 23(E).

14. When one party, usually the utility, has given notice of an intent to terminate, the parties' regular practice during the course of the last two decades has been to agree that Petitioners' facilities may remain on the poles during the conduct of good faith negotiations towards a new pole agreement. Ex. 7, ¶ 15; Ex. 8, ¶ 5. When a pole agreement in Florida has been terminated during the past two decades, the parties' custom and course of dealing has been to permit Petitioners' facilities to remain in place under the terms of the prior contract during the negotiation of a new pole agreement. Ex. 7, ¶ 15; Ex. 8, ¶ 5.

15. Over the last several weeks, Gulf Power began the process of announcing to cable operators its intention to demand that cable operators within its service area execute new pole agreements. Gulf Power also began informing these cable operators of its intention to demand pole-rates under the new pole agreements that will exceed the current rate by **more than 514 percent (and in one case as high as 550 percent)** to a new rate of \$38.06 per pole.

16. Gulf Power's communications did not provide any indication that the costs incurred by Gulf Power attributable to the presence of Cable Operator Complainants' pole attachments have changed in any way. Exs. 9, 10 and 11.

17. Cable Operator Complainants notified Gulf Power of their desire to maintain ongoing relations and, pursuant to the Commission's rules in 47 C.F.R. §§ 1.1404(g) and (j), requested information concerning why Gulf Power intends to terminate such relations and what data underlies both its current pole rate and its proposed new rate of \$38.06 per pole. Ex. 12; Ex. 7, ¶ 8.<sup>3</sup>

18. Gulf Power informed Cable Operator Complainants that it would not engage in any negotiations regarding execution of the new pole attachment agreement. Ex. 7, ¶ 10. Moreover, while providing some explanation of its new \$38.06 rate, Gulf Power refused to provide Petitioners with cost data required by 47 C.F.R. §§ 1.1404(g) and (j) for its current and proposed pole rates, including investment per pole; cost of capital; tax costs; maintenance expense; depreciation; and administration expense. Ex. 14; Ex. 7, ¶ 9. Instead, Gulf Power refused to provide the required information until Cable Operator Complainants execute Confidentiality Agreements severely limiting their use of the information in a proceeding before the Commission. Ex. 15.

19. Despite Gulf Power's refusal to provide the required information, Complainants have prepared a rate study based on available information indicating that the

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<sup>3</sup> One cable operator (Mediacom) signed the new agreement under protest, and expressly rejected the \$38.06 rate. Ex. 13.

maximum pole attachment rate that Gulf Power can charge does not exceed the current rate that it is attaching Cable Operator Complainants.<sup>4</sup>

20. There is no "market" in Florida in which competing utility pole owners compete with Gulf Power to license space for cable pole attachments.

21. Cable Operator Complainants cannot reasonably reproduce a substitute for, or replace, Gulf Power's poles.

22. It is a violation of 47 U.S.C. § 224 for Gulf Power to unilaterally force Cable Operator Complainants to execute new pole agreements, terminate existing contracts and flatly refuse any request for good faith negotiations.

23. Gulf Power has an obligation under Section 224 to negotiate in good faith, and not to unilaterally terminate such agreements as a method of forcing Cable Operator Complainants to accept whatever terms, conditions, and rates the utilities wish to impose.

24. Gulf Power's actions represent an unprecedented break in the established course of dealing maintained for a substantial number of years.

25. Gulf Power's refusal to negotiate threatens to leave Cable Operator Complainants without pole attachment agreements under which to operate, resulting in a disruption to their business and preventing them from continuing to provide services to customers.

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<sup>4</sup> Indeed, close adherence to the FCC's formula produces an attachment rate between \$4.16 and \$4.93 per pole per year. Ex. 16. Moreover, Gulf Power conceded in its correspondence with Cox Communications Gulf Coast and Comcast that its own calculation, in accordance with the Commission's rate calculation formula, yielded an annual attachment rate of \$4.61. Cable Operator Complainants nevertheless have no dispute with paying the moderately higher rates in the \$5.00 to \$6.20 range, to which they voluntarily contracted. Based on the information acknowledged by Gulf Power, Cable Operator Complainants are paying pole rental charges higher than the maximum permitted rate calculated under the Commission's rules.

26. Gulf Power seeks to alter the terms of existing pole attachment agreements that have been voluntarily entered into and maintained during a multi-year course of dealing. A number of these agreements have additional time remaining on them and are therefore still valid.

27. Gulf Power's abrupt and arbitrary termination of its contracts with Cable Operator Complainants, its imminent invalidation of the terms governing their use of existing attachments, and its effort to force them to accept the exorbitant new rate of \$38.06 per pole are likely to cause substantial and irreparable harm to Cable Operator Complainants in the form of lost customers, competitive disadvantage in rolling out new services and products and damage to business reputation and goodwill. Ex. 7, ¶¶ 15-18; Ex. 8, ¶¶ 5-7, 9-11, 13-15.

28. Gulf Power's current pole rate and proposed rate increase to \$38.06 do not comply with the Commission's methodology for calculating pole attachment rates.

#### **IV. RELIEF REQUESTED**

29. Complainants respectfully request the Commission to:
- a. declare Gulf Power's unilateral attempts to force Cable Operators to execute new pole attachment contracts to be an unreasonable practice;
  - b. order Gulf Power to cease and desist from terminating Cable Operators' current pole attachment arrangements;
  - c. order Gulf Power to negotiate in good faith if it wishes to alter the terms and conditions of Cable Operators' pole attachment arrangements;
  - d. order Gulf Power to comply with Commission rule 1.1404(g) and prohibit any pole rate increase that exceeds that authorized by the Commission's rules;

- e. declare unlawful Gulf Power's proposed \$38.06 pole attachment rate;
- f. set an annual pole attachment rate for cable operators in Florida in an amount not greater than the current contract rate not to exceed \$6.20 per pole;
- g. order Gulf Power to refund to Complainant Cable Operators all amounts paid by Complainant Cable Operators in excess of the proper rates plus interest;
- h. order Gulf Power to refrain from acting, or refusing to act, in a manner that in any way prejudices Complainant Cable Operators' rights under their pole attachment license agreements or other attachment arrangements; and
- i. grant Complainants such other relief the Commission deems just, reasonable and proper.

Respectfully submitted,

**FLORIDA CABLE TELECOMMUNICATIONS  
ASSOCIATION, INC., et al**

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July 10, 2000